STATE OF MICHIGAN
IN THE SUPREME COURT

TEDDY 23, LLC, a Michigan limited liability company, and MICHIGAN TAX CREDIT FINANCE, LLC, a Michigan limited liability company d/b/a MICHIGAN PRODUCTION CAPITAL,

Plaintiffs/Appellants,

v

MICHIGAN FILM OFFICE and MICHIGAN DEPARTMENT OF TREASURY,

Defendants/Appellees.

Docket No. 153420

Court of Appeals Nos. 323299, 323424

Ingham Circuit Court
No. 14-702-AA

Court of Claims
No. 14-39-MT

SUPPLEMENTAL BRIEF OF APPELLEE MICHIGAN FILM OFFICE

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Dated: January 18, 2017

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INTRODUCTION

On December 7, 2016, this Court directed the clerk to schedule oral argument on whether to grant the Film Companies' application for leave to appeal or to take other action in this case. See Order, dated 12/7/16. The Court also ordered the parties to provide supplemental briefing on: (1) whether the Court of Claims had jurisdiction over plaintiffs' claims under MCL 600.6419(1)(a); and (2) whether MCL 600.631 created exclusive jurisdiction over plaintiffs' claim in the circuit court, including whether the denial of the postproduction certificate of completion was "a decision . . . of [a] state board, commission, or agency authorized under the laws of this state to promulgate rules from which an appeal or other judicial review has not otherwise been provided for by law." *Id.*

As to the first question, § 6419(1)(a) of the Court of Claims Act does not grant the Court of Claims jurisdiction over plaintiffs' suit because their complaint constitutes the appeal of an administrative decision of a state agency that is authorized by law. Further, paragraph (5) of § 6419 recognizes that the circuit court has exclusive jurisdiction over plaintiffs' case: "This chapter does not deprive the circuit court of exclusive jurisdiction over appeals from . . . administrative agencies as authorized by law." But even if no statute provides the necessary authority required by paragraph (5), the plain language of paragraph (1)(a) would still not vest the Court of Claims with jurisdiction because paragraph (1)(a) applies only to claims and demands, not to appeals. Instead, plaintiffs' suit would constitute a challenge to an agency's decision from which no appeal could be taken and plaintiffs would have no avenue for judicial review.

As to the second question, the Film Office's denial of a postproduction certificate of completion is an appealable decision under article 6, § 28 of Michigan's 1963 Constitution and under § 631 of the RJA. Therefore, as a decision of a state agency authorized under the laws of the state to promulgate rules from which an appeal or other judicial review has not otherwise been provided for by law, MCL 600.631 vested the circuit court with exclusive jurisdiction to hear plaintiffs' appeal of the Film Office's decision.[1]

ARGUMENT

I. To the extent the Film Companies could seek direct review of the Film Office's decision, the Constitution and Revised Judicature Act provide the circuit court with exclusive jurisdiction to conduct that review.

Generally, there are three potential avenues of review by which an aggrieved party may challenge the decision of an administrative agency: (1) review pursuant to a procedure set forth in a statute applicable to a particular agency; (2) the review provided for under the Administrative Procedures Act (APA); or (3) the constitutional provision allowing for judicial review of an administrative agency decision, article 6, § 28, which is effectuated by § 631 of the Revised Judicature Act (RJA) and provides for an appeal to circuit court.

Here, there is no statute applicable to the Film Office which sets forth a procedure for review of the Film Office's denial of a post-production certificate of

[1] For analytical purposes, the Court's second question will be addressed first in the Argument section of this brief.

completion. Therefore, the first avenue of review is not available to these Film Companies.

As to the second avenue of review, the APA applies only to proceedings involving a "contested case." MCL 24.301 ("When a person has exhausted all administrative remedies available within an agency, and is aggrieved by a final decision or order *in a contested case*, whether such decision or order is affirmative or negative in form, the decision or order is subject to direct review by the courts as provided by law.") (emphasis added); *In re Elias*, 294 Mich App 507, 537 (2011) ("The scope of judicial review outlined in the APA applies only to contested cases."). A contested case is a "proceeding . . . in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing." MCL 24.203. Since a contested case hearing was not required and never held, the second avenue of review brought under the APA is not available. See MCL 24.301.

Therefore, to the extent the Film Companies have an avenue to challenge the Film Office's decision, it must be by way of the Constitution and the RJA, specifically MCL 600.631. And as will be discussed, because the constitutional and statutory requirements necessary to pursue that avenue of relief have been met, exclusive jurisdiction over the Film Companies appeal rests with the circuit court.

A. The Constitution provides direct review of an agency's decision.

Article 6, § 28 of Michigan's Constitution states:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law . . . .

As can be seen by the language of this provision, article 6, § 28 is not an absolute guarantee of judicial review of every administrative decision. *Midland Cogeneration Venture Ltd P'ship*, 489 Mich 83, 91 (2011). In order for that provision to apply, three conditions must be satisfied: (1) the administrative decision must be a "final decision" of an administrative agency; (2) the agency must have acted in a "judicial or quasi-judicial" capacity; and (3) the decision must affect private rights or licenses. *Id.* Here, all three of these requirements are met.

1. The post-production certificate of completion was a final agency decision.

As to the first requirement, the December 11, 2013 decision of the Michigan Film Office denying the Film Companies' application for a post-production certificate of completion is the decision being challenged in this action. That decision was the final decision of the Michigan Film Office. The first prong of the constitutional test requiring that there be a final agency decision has been satisfied.

2. The Film Office's decision was issued in a quasi-judicial capacity.

As to the second factor, the Film Office was not acting in a judicial capacity when it rendered its final decision. Therefore, to fall under article 6, § 28, the Film Office must have been acting in a quasi-judicial capacity in rendering its decision.

In *Midland Cogeneration*, this Court applied a broad interpretation of the term "quasi-judicial," relying both on its use in a prior court opinion and on *Black's Law Dictionary*, which defined the term to mean:

> A term applied to the action, discretion, etc., of public administrative officers, who are required to investigate facts, or ascertain the existence of facts, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature. [489 Mich at 91–92, quoting *Black's Law Dictionary* (4th ed).]

This Court determined that classification decisions by the State Tax Commission were quasi-judicial in nature because they resolved disputed factual claims on a case-by-case basis that required an evaluation of evidence and dispute resolution. *Id.* at 92. The evaluation of evidence and employment of dispute resolution were activities deemed to be "quasi-judicial" functions. *Id.* In addition, the Tax Commission's actions were styled as an arbitration of sorts where the Commission received written petitions and adjudicated disputed claims which this Court also found to be quasi-judicial in nature. *Id.*

These types of functions, already construed by this Court as quasi-judicial, are the same types of functions performed by the Film Office in rendering decisions on applications for post-production certificates of completion. Like the State Tax Commission in *Midland Cogeneration,* the Film Office's denial of a postproduction certificate of completion is not a general rulemaking or advisory decision. Rather, the Film Office must determine whether "an eligible production company has complied with the terms of [its] agreement" on a case-by-case basis, MCL 208.1455(5); in the course of making that determination, the Film Office has authority to "request additional information" regarding an application or to require

independent certification in support of the application (or both). MCL 208.1455(5). And no certificate need be issued unless and until the Film Office is satisfied that "direct production expenditures, qualified personnel expenditures, and eligibility are adequately established." *Id.*

In other words, the Film Office has discretion in the ordering and receipt of proofs from an applicant and can deny an application if the Film Office determines that an applicant's proofs have not been sufficiently established. The receipt and evaluation of proofs, the resolution of disputed facts, and the issuance of a decision subject to the establishment of adequate proofs are all quasi-judicial functions. Thus, when rendering a decision on the issuance of a post-production certificate of completion, the Film Office is acting in a quasi-judicial capacity.

3. The Film Office's decision to deny the post-production certificate of completion affected these Film Companies' private rights.

Finally, in order for § 28 to apply, the Film Office's decision must affect "private rights or licenses." In *Midland Cogeneration*, this Court construed "private rights" in accordance with the *Black's Law Dictionary* definition to mean "a personal right, as opposed to a right of the public or the state." *Id.* at 92-93. Right was defined as "the interest, claim or ownership that one has in tangible or intangible property." *Id.*

Here, the Film Companies have a private interest in the receipt of the post-production certificate of completion because an approved certificate (i.e. tangible

property) results in the receipt of a tax credit. Thus, the Film Office's decision to deny the certificate affected these Film Companies' private rights.

4. Each constitutional requirement being met, these Film Companies had a direct appeal under article 6, § 28 of Michigan's Constitution.

Because the Film Office's denial of the post-production certificate of completion in this case was (1) the final decision of an agency existing under the law; (2) was quasi-judicial in nature; and (3) affected a private right, it was subject to direct review "as provided by law" pursuant to article 6, § 28.

B. Section 631 of the RJA sets forth the mechanics of how to file a direct appeal of an agency decision in conjunction with article 6, § 28.

While article 6, § 28 provides the Film Companies with a direct appeal, it does not govern how that appeal should be taken. Instead, it indicates only that the appeal should be taken "as provided by law." In this case, § 631 of the RJA works in conjunction with article 6, § 28 and sets forth *how* that appeal must be taken. In other words, § 631 is the law that provides the requirements for, and manner of, the review established in § 28. *Viculin v Department of Civil Service*, 386 Mich 375, 395 (1971).

In particular, § 631 states:

> An appeal shall lie from any order, decision, or opinion of any state board, commission, or agency, authorized under the laws of this state to promulgate rules from which an appeal or other judicial review has not otherwise been provided for by law, to the circuit court of the county of which the appellant is a resident or to the circuit court of

> Ingham county, which court shall have and exercise jurisdiction with respect thereto as in nonjury cases. Such appeals shall be made in accordance with the rules of the supreme court. [MCL 600.631.]

Pursuant to this plain language, an appeal lies from: (1) any order, decision or opinion; (2) of any state board, commission or agency, authorized under the laws of this state to promulgate rules; (3) from which an appeal or other judicial review has not otherwise been provided for by law.

Since, as discussed, the Film Companies had a direct appeal under § 28, the question becomes whether they meet these requirements of § 631 such that they may then seek review in the manner provided therein, i.e., an appeal, filed in accordance with the rules of this Court, to the circuit court of the county where they resided or in the Ingham County circuit court. As will be discussed, the answer to that question is "yes."

1. The denial of the post-production certificate of completion is a decision of the Film Office.

As set forth above, the Film Office's December 11, 2013 letter was a final decision to deny the Film Companies' application for a post-production certificate of completion.

2. The Film Office is a state board, commission, or agency authorized to promulgate rules.

Contrary to what its moniker may suggest, the Michigan Film Office is a state board, commission, or agency. There are two independent bases requiring this conclusion.

First, the Michigan Film Commissioner, who is the head of the Film Office, can promulgate administrative rules as necessary. MCL 125.2029b(1), (6). And under the APA, "rule" means "an *agency* regulation, statement, standard, policy, ruling or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency." MCL 24.207 (emphasis added). Since a "rule" relates only to the action of an agency under the APA, and since the Commissioner can make "rules" on behalf of the Film Office by law, the Office is an "agency" under the APA.[2]

This conclusion is consistent with, and independently supported by, the history of the Film Office. More specifically, when the Film Office was created under Public Act 75 of 2008, it assumed all authority, powers, duties, functions and responsibilities of the Office of Film and Television Services ("OFTS"). MCL 125.2029a(1).[3] Under § 21 of PA 63 of 2001, the OFTS was transferred to the Department of History, Arts, and Libraries by type II transfer. A type II transfer means the "transferring of an existing department, board, commission or agency to

[2] Agency is defined by the APA as "a state department, bureau, division, section, board, commission, trustee, authority or officer, created by the constitution, statute, or agency action." MCL 24.203. Since the office of Film Commissioner is created by statute, the Michigan Film Office itself, by extension, would fall within this definition.

[3] MCL 125.2029a(1) states as follows: "The Michigan film office is created in the fund. The office shall be the successor to any authority, powers, duties, functions, or responsibilities of the Michigan film office under former section 21 of the history, arts, and libraries act, 2001 PA 63."

a principal department established under this act." MCL 16.103(b). The OFTS was not a state department because, there may be no more than 20 principal departments of the state, and the OFTS had not been designated as one of those principal departments. Const 1963, art 5, sec 2. Thus, by process of elimination, the OFTS must have been either a board, commission, or agency. While the OFTS was likely an agency rather than a board of commission, it is immaterial for purposes of this analysis because, by its plain language, § 631 of the RJA applies to all three. Since a type II transfer of a board, commission, or agency was used to effectuate the Office of Film and Television Services' move to the Department of History, Arts, and Libraries, and since the Film Office is the successor of the Office of Film and Television Services, the Film Office must also be a board, commission, or agency.

3. No other vehicle to appeal the Film Office's decision exists.

As mentioned at the outset, there is no procedure set forth in a statute applicable to the Film Office that provides the Film Companies with a right to appeal. Nor do these Film Companies have a right to review under the APA. Therefore, Section 631 of the RJA is the only vehicle by which a direct appeal of the Film Office's decision could be filed.

C. The Film Companies had a right to appeal the Film Office's decision under the law.

Under the Constitution and RJA, the Film Companies had legal authority to file an appeal of the decision of the Film Office denying their post-production certificate of completion. That filing, however, could be accomplished only in the manner prescribed by § 631 of the RJA, which requires an appeal to be filed in the circuit court, and further provides that the circuit court "shall have and exercise jurisdiction with respect thereto."

Accordingly, to the extent the Film Companies could seek direct review the Film Office's decision, the Constitution and the Revised Judicature Act provide the circuit court with exclusive jurisdiction to conduct that review. This conclusion is in no way altered, and in fact is specifically supported, by the Court of Claims Act.

II. The Court of Claims did not have jurisdiction over the Film Companies' administrative appeal in light of MCL 600.6419(5) which recognizes the circuit court's exclusive jurisdiction.

Section 631 of the RJA, which, as just discussed, vests the circuit court with jurisdiction over administrative appeals, is not in conflict with the Court of Claims Act, which, as will be discussed, vests exclusive jurisdiction over certain claims or demands in the court of claims. There are two reasons for this. First, § 6419(5) of the Court of Claims Act specifically recognizes the circuit court's exclusive jurisdiction over appeals from administrative agencies "as authorized by law." Because the Film Companies' appeal was authorized by law, i.e., by the Constitution and the RJA, the circuit court had exclusive jurisdiction. Second, assuming *arguendo* that the appeal was not authorized by law, the defective appeal

would not transform into a claim or demand over which the Court of Claims had jurisdiction. Instead, the decision of the Film Office would be an administrative decision from which no appeal would lie, and the Film Companies would have no legal right to judicial review.

A. The Court of Claims Act explicitly recognizes and maintains the exclusive jurisdiction of the circuit court over appeals from administrative agencies authorized by law.

MCL 600.6419(1)(a) provides the Court of Claims with exclusive jurisdiction:

> [t]o hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court.

The principal goal of statutory construction is to ascertain and give effect to the intent of the Legislature. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515 (1998). The first criterion in determining intent is the specific language of the statute. *In re MCI Telecommunications Complaint*, 460 Mich 396, 411 (1999). If the plain and ordinary meaning of the language is clear, then judicial construction is normally neither necessary nor permitted. *Id.* Moreover, parts of the same act must be construed harmoniously to effectuate the Legislature's intent, *Macomb Co Prosecutor v Murphy*, 464 Mich. 149, 159 (2001), and statutes from different acts that relate to the same subject, or share a common purpose, are *in pari materia* and must be read together as one law even if they contain no reference to one another and were enacted on different dates. *State Treasurer v Schuster*, 456 Mich 408, 417 (1998).

By its plain language, paragraph (1)(a) places "any *claim* or *demand*, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable or declaratory relief" made against the State within the exclusive jurisdiction of the court of claims. MCL 600.6419(1)(a) (emphasis added). Under this admittedly broad language, one could try to argue that an appeal is a type of "claim" or "demand" and is therefore included within the exclusive jurisdiction of the court of claims pursuant to subpart (1)(a). But paragraph (5) of that section states that "[t]his chapter does not deprive the circuit court of exclusive jurisdiction over *appeals* from the district court and administrative agencies as authorized by law." MCL 600.6419(5) (emphasis added). The fact that the Legislature used the term "appeals" in paragraph (5) evidences an intent to assign that word a different meaning than the words "claim" and "demand" in paragraph (1)(a). See generally, *United States Fidelity Ins & Guaranty Co v Michigan Catastrophic Claims Ass'n*, 484 Mich 1, 14 (2009) ("[w]hen the Legislature uses different words, the words are generally intended to connote different meanings.") Thus, the plain language of the statute reveals that the Legislature did not intend for "appeals" to be included in the general grant of original jurisdiction over "claims" and "demands" outlined in § 6419(1)(a).

Secondly, paragraph (5) of § 6419 states that the Act "does not deprive" the circuit court of exclusive jurisdiction over appeals from administrative agencies "as authorized by law." When each phrase is read together and harmonized, paragraph (5) means that the circuit court maintains exclusive jurisdiction over appeals from

administrative agencies when the circuit court's jurisdiction over those appeals has been authorized by law. So, as here, where the circuit court was granted jurisdiction over the Film Companies' appeal by § 631 of the RJA and by article 6, § 28, the Court of Claims Act does not operate to deprive the circuit court of that jurisdiction. Instead, the jurisdiction of the circuit court over that administrative appeal is recognized as exclusive. To the extent a statute such as MCL 462.26, for example, required an appeal of an administrative decision to be filed in the Court of Appeals, § 6419(5) would be inapplicable and would not infringe on the Court of Appeals' jurisdiction, because the circuit court's jurisdiction over such an appeal was not "authorized by law." Instead, the specific grant of appellate authority provided under MCL 462.26 would apply, and the case would be properly filed in the Court of Appeals.

Section 631 of the RJA can also be harmonized with this interpretation.[4] The "not otherwise been provided for by law" clause of § 631 transforms that section into a catch-all provision that directs all administrative appeals for which review is afforded by the Constitution, but a process of review is not otherwise prescribed, to the jurisdiction of the circuit court. Section 6419(5)'s reference to appeals "as

[4] As discussed, Section 631, states, in part:

> An appeal shall lie from any order, decision, or opinion of any state board, commission, or agency, authorized under the laws of this state to promulgate rules from which an appeal or other judicial review has not otherwise been provided for by law, to the circuit court of the county of which the appellant is a resident or to the circuit court of Ingham county, which court shall have and exercise jurisdiction with respect thereto as in nonjury cases. [Emphasis added.]

authorized by law" can be read as honoring all statutory grants of jurisdiction to the circuit court, even those accomplished by process of elimination. So, for example, to the extent an appeal arises from article 6, § 28 and is vested in the circuit court by § 631 because no other mechanism for appeal has been provided by law, paragraph (5) of Section 6419 is explicit recognition that nothing in the Court of Claims Act shall be construed as depriving the circuit court of that exclusive jurisdiction once so authorized. And since § 6419(1)(a) cannot be construed as otherwise providing jurisdiction over administrative appeals, both § 631 and § 6419 can be given effect without making any part of either section nugatory or superfluous.

Lastly, this interpretation also satisfies the principal of *in pari materia,* which requires that § 6419(5) of the Court of Claims Act and § 631 of the RJA be read together as one law since the two relate to the same subject (i.e., jurisdiction over appeals of agency decisions). Under general rules of statutory construction, the Legislature is presumed to know of and legislate in harmony with existing laws. *Herrock Dist Library v Library of Mich,* 293 Mich App 571, 592, n 13 (2011). Thus, it is reasonable to assume that the Legislature knew that the circuit court had jurisdiction over agency appeals, as authorized by the law, and was trying to make clear that the amendment to the Court of Claims Act (the later amended of the two acts) was not intended to alter or infringe upon the jurisdiction of the circuit court as it related to those administrative appeals.

In fact, this would not be the first instance in which the Legislature clarified its intent to maintain the circuit court as the exclusive arbiter of administrative

appeals as authorized by law. The Legislature has allowed, under certain circumstances, concurrent jurisdiction among the trial courts in a judicial circuit. MCL 600.401. But the Legislature also specifically acknowledged that, regardless of any plan of concurrent jurisdiction, "[t]he circuit court has exclusive jurisdiction over appeals from the district court and from administrative agencies as authorized by statute." MCL 600.8404(a). The Court of Claims Act can, and therefore should, be given a harmonious interpretation under the doctrine of *in pari materia*.

Assuming the Film Companies' appeal was authorized by law as set forth in Argument I of this brief, § 631 of the RJA should be read together with § 6419(5) of the Court of Claims Act to vest the circuit court with "exclusive" jurisdiction over the Film Companies' appeal. Because the RJA grants only the circuit court jurisdiction over administrative appeals as authorized by law, and because the Court of Claims Act confirms that it is not to be read as depriving the circuit court of this "exclusive" jurisdiction, the plain language of the two acts read together mean that only the circuit court could have exercised jurisdiction of the Film Companies' appeal in this case.

B. Even if the Film Companies' appeal was not "authorized by law" as set forth in MCL 600.6419(5), the Court of Claims still lacks jurisdiction.

As discussed, § 6419(5) states, "[t]his chapter does not deprive the circuit court of exclusive jurisdiction over appeals from the district court and administrative agencies *as authorized by law*." (Emphasis added). The term "as authorized by law" used in paragraph (5) is recognition that an appeal may only be

filed in the circuit court as allowable by statute or the Constitution. In other words, the right to appeal must exist independently under law; and, if it does, then the appellant is required to pursue their appellate rights in accordance with those laws. Section 6419(1)(a) does not vest the Court of Claims with jurisdiction over appeals. Thus, if an appeal is not "authorized by law" under paragraph (5), the claimant does not default to the general jurisdictional grant of the Court of Claims. Instead, the appellant would be barred from appealing.

This consequence was true even before the amendment to the Court of Claims Act and aligns with this Court's recognition in *Midland Cogeneration* that not every administrative decision has a guaranteed right to judicial review. 489 Mich at 91. Thus, to the extent this Court were to find that these Film Companies were not authorized by law to file an appeal, then neither the court of claims nor the circuit court would have jurisdiction.

CONCLUSION AND RELIEF REQUESTED

The Film Companies could appeal the denial of their application for a post-production certificate of completion under article 6, § 28. But that appeal could be filed only in the circuit court pursuant to MCL 600.631. The circuit court's exclusive jurisdiction over plaintiffs' appeal is explicitly recognized in MCL 600.6419(5) and implicitly recognized in the plain language of MCL 600.6419(1). Therefore, in answer to this Court's questions: (1) the Court of Claims did not have jurisdiction over plaintiffs' claims under MCL 600.6419(1)(a); and (2) MCL 600.631 did create exclusive jurisdiction over plaintiffs' claim in the circuit court.

Accordingly, because these Film Companies incorrectly filed their appeal in the Court of Claims, that court properly dismissed for lack of jurisdiction. The Film Companies' application for leave to appeal that decision should be denied.

Respectfully submitted,

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Dated: January 18, 2017
2014-0071041-F